was not going to say that Terry was wrong in deciding to use the key rather than the bar. (S.F. p. 65). The evidence showed that Terry had used a key to attempt to stop the brake-shoe rather than a bar.

In addition to the foregoing there was testimony that a bar was available. (S.F. p. 325), and there was some opinion testimony by a co-worker of Respondent, that some sort of plate would prevent a brake-shoe from falling on to the rail, but he had never seen one (S.F. p. 330) and there was no evidence that any such equipment existed. The brake-shoe had been weighed and its weight was fifty pounds. (S.F. p. 97).

The jury, in accordance with Texas Special Issue practice, found Petitioner negligent in three respects, as follows:

1. Respondent's co-worker was negligent in using the key, rather than the bar;
2. Petitioner failed to furnish proper equipment to prevent the shoe from falling onto the rail;
3. Petitioner failed to furnish Respondent with a safe place in which to work.

In Petitioner's opinion these various acts are closely related, and Petitioner has briefed them together.

The Federal Questions sought to be reviewed herein were raised by Petitioner in the Trial Court by Motion for Instructed Verdict at the close of *Plaintiff's* case (Tr. p. 47), and at the close of all the evidence (Tr. p. 51); by objecting to the submission of the issues to the jury (Tr. p. 55), and by urging motion for judgment non obstante veredicto (Tr. p. 31).

Reasons For Granting The Writ

1. The decision of the Court of Civil Appeals has decided a federal question of substance not in accord with applicable decisions of this Court. *Inman v. Baltimore & O. R.R. Co.*, 80 S. Ct. 242.

Argument Amplifying Reasons For Granting The Writ

The decision by the Texas Court of Civil Appeals failed to give proper consideration to F.E.L.A. cases decided by this Court, and cases decided by Federal Courts of Appeal in which Petitions for Writ of Certiorari had been denied. In the recent case of *Inman v. Baltimore & Ohio R.R. Company*, 80 S. Ct. 242, this Honorable Court had under consideration the question of whether the evidence in that case was sufficient to make the negligence issue one for the jury. In holding that there was not any evidence of negligence, this Court stated:

> "The act does not make the employer an insurer. Here petitioner had been working at Bettes Corners for 7 years, performing the same duties under like circumstances and, for some three years on this identical midnight shift. No accidents had occurred during that long period. In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the Railroad could have played no part in petitioner's injury.
>
> "The contention of the petitioner is that the witness' remark, 'like a lot of them I seen there, jumping the gun', was testimony of other occurrences at the crossing similar to the one herein involved. The burden of proving that the crossing was an unsafe

> place to work was on petitioner. It depended on some type of testimony showing the hazards at the crossing. There is no evidence of complaint to the Railroad, nor is there other testimony of similar occurrences in the record. In making the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found that there was 'no evidence of prior occurrences of the kind here under consideration' in the record. Indeed, unless these eleven words can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous."

Petitioner, of course, realizes that opinions of the Federal Courts of Appeals can not be considered as authoritative, even when a Petition for Writ of Certiorari has been denied in the case, when this Court is being addressed. However, with that realization in mind, Petitioner still desires to cite to this Honorable Court the case of *Atlantic Coast Line R.R. Co. v. Callins* (Ct. of Appeals, 1956, 4th Cir., 235 F. 2d 805; Writ of Cert. denied Dec. 10, 1956, 77 S. Ct. 265). This Petition was denied between the time the case of *Rogers v. Missouri Pacific Railroad Co.* (352 U.S. 500, 77 S. Ct. 443) was argued, Nov. 7, 1956, and the time the *Rogers* case was decided. The Court of Appeals in holding that the Petitioner had not made a case for the jury, stated: (P. 807 of 235 F. 2d).

> "In the last analysis the plaintiff's case rests upon the contention that negligence upon the part of the railroad company must be inferred from the mere happening of the accident. He says in effect, that since it was so hard to lift the lever of the switch to the upright position, that he hurt his back, the switch mechanism must have been defective, and the railroad company was negligent in furnishing it. But this simple

statement leaves out of account other material features of the evidence on his behalf which must be taken into consideration. He also showed that the switch was operated many times each day, that he himself had operated it a dozen times on the night that he was hurt; and that neither he nor his companions who had operated it on previous occasions and found it harder to use than some other switches, had ever complained of its condition to their superiors. This testimony taken in the light most favorable to the plaintiff may give rise to the speculation whether the injury was due to a defective switch of the railroad company or to the defective back of the man; but speculation is not enough. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonable possible inferences favoring the party whose case is attached. (Citing cases.)'"

While the two cases cited above do not explicitly state, it is clear that they are applying the concept of negligence laid down by this Court in the Case of *Tiller v. Atlantic Coast Line R. Co.* (1943), 318 U.S. 54, 63 S. Ct. 444 at p. 451 of 63 S. Ct., in the following words:

"In this situation, the employers liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such person under the existing circumstances would not have done. . . . Of course, in any case, the standard of care must be commensurate to the dangers of the business. (citing cases)"

This concept of negligence, of course, requires that before liability can be fastened upon an employer some

danger or injury must be reasonably forseeable to the employer. This, of course, means only that a reasonable person in the exercise of *ordinary care* would not take precautions to guard against an injury not reasonably forseeable. As stated in *Brady v. Southern Ry. Co.* (1943), 320 U.S. 476, 64 S. Ct. 232 at P. 236, "Bare possibility is not sufficient. . . . Events too remote to require reasonable provision need not be anticipated. . . .".

Bearing in mind this concept of negligence we believe that the risk or harm, which the jury in the instant case found should have been protected against, should be examined. These three employees were the only ones working in the near vicinity of this area and hence there was no danger to any of the other employees. There was no danger of the brake shoe striking any of the men because it having failed to stop at the appointed place, only slid on down to the rail. No one could or would be struck by the shoe, as no employee would have any part of his body in the area in which the shoe would slide.

What alleged risk or harm exists to be protected against, since there was no danger of the shoe striking anyone if it did not stop at the appointed place? The only possible risk or harm to be protected against would be that risk or harm incurred by the employee in sliding the brake shoe back up the wheel to the appointed spot. The shoe in question weighed 50 pounds. While Respondent estimated the weight of the shoe to be from 60-70 pounds, he frankly admitted that he had not weighed one. (S.F. P. 95). There was testimony, which was not disputed, that one of these brake shoes had been weighed and that it weighed 50 pounds. In view of this, Petitioner submits

that the uncontested evidence is that the weight of the shoe was 50 pounds. Thus we see that the only alleged risk was that which occurs when a workman is required to lift a weight of 50 pounds.

On this particular point, requiring Respondent to lift fifty pounds, the holding of the Texas Court is directly contra to the decision of the Court in the case of *Crookham v. New York Central Ry. Co.* (Sup. Ct. W. Va., 1959), 107 S.E. 2d 516, Writ of Cert. Den. 80 S. Ct. 65. In that case the court rejected a contention of insufficient help where three employees lifted ties which weighed from 141 to 220 pounds. The weight to each employee varied from 47 to 73 pounds, much more than Respondent was lifting on the occasion in question.

There is some language in the opinion of the Texas Court of Civil Appeals in this case, which would leave one to believe that Respondent was subjected to extraordinary and peculiar stress and strain to his back because of his position at the time of the lifting. There was some conclusion testimony by lay witnesses that Respondent was in an awkward position. However, there is no testimony in the record that the position of Respondent caused any undue or unusually heavy strain. In fact, the undisputed medical testimony, which was read into evidence by Petitioner, was that when a person lifts on his knees, the back is erect and, "as long as the back is erect there is very little strain thrown on it, regardless of what you do. . . .". (S.F. P. 274). Also there is no evidence that lifting while on the knees would cause any unusual strain on the abdomen. The statements of the Texas Court of Civil Appeals, in its opinion that:

" . . . the man doing the lifting must squat or kneel into an awkward position to lift the brake shoe, and in this position Mendoza could not lift with the use of his legs, but must lift with his back only. In this squatting or kneeling position Mendoza was in a strain." (P. 11 of Opinion)

" . . . in order to grip it (the brake shoe) the workman was required to get in an awkward position, which put him in a strained position, particularly as to his back." (P. 13 of Opinion)

"It is our view that the jury was justified in concluding that it could reasonably be anticipated that a workman might be injured if required to assume an awkward strained position when a heavy object had to be lifted under circumstances where the object is difficult to grasp, and the lifting done by the use of the back alone without benefit of the legs." (P. 13 of Opinion)

"It appears that because of the manner that the crew was working at the time, and in the absence of mechanical devices it became Plaintiff's job to place himself in a kneeling position, and this put a strain on his back in lifting the shoe." (P. 14 of Opinion)

are directly contrary to the undisputed medical testimony in the case. There is absolutely no evidence that Respondent was subjected to any unusual strain due to the fact that he was lifting while on his knees.

Thus we see that the alleged risk to be guarded against was the risk that one of the employees would have to lift a fifty pound brake shoe about ten inches. It was the alleged failure to properly guard against this risk which the jury found to be negligent. It is the position of Petitioner that no harm is reasonably forseeable by requiring its em-

ployees to lift as much as fifty pounds approximately ten inches. Certainly there is no undue risk involved in requiring an employee, who was accustomed to and ordinarily did heavy manual labor, as Respondent and his co-employees did, (S.F. P. 407), to lift a mere fifty pounds. These men were of course trained and accustomed to doing this type of work. We can not believe that the standard of the reasonable prudent man has reached such a point that it is negligence to require a workman to perform hard labor.

The Texas Court of Civil Appeals wholly failed to consider the applicability of the principles applied by this Court in the *Inman Case, Supra*, and by the Court of Appeals in the *Collins Case, Supra*. Certainly the holding by the Texas Court in this case is directly contra to the holding of this court in the *Inman Case* and of the Court of Appeals in the *Collins Case*.

This case and the *Inman Case, Supra*, are strikingly similar in several important respects. In the *Inman Case*, Plaintiff had been doing the same duties at the same location some seven years without mishap. In the instant case the Respondent was doing the identical work in the same identical manner that he had been doing *every day* for several years without mishap. One witness testified he had changed three or four hundred brake shoes with Respondent (S.F. P. 410). In the *Inman Case* and in the instant case, there had not been any complaints to the carrier regarding the work, or the way or manner in which it was performed, or in the equipment furnished or not furnished. The employer in the instant case, as the employer in the *Inman Case*, had every reason to believe that the employee was

fully satisfied with the equipment, method and conditions of employment.

Also, as in the *Inman Case, Supra*, there is absolutely no evidence in the record that any other person was ever injured by doing this piece of work. Certainly the Respondent himself had never been injured doing this work before, notwithstanding the fact that he had done this particular work *every day*. Certainly where work is being done in the same manner in which it has been done many times prior thereto without mishap, there is no cause or reason for the employer to anticipate an injury or risk of injury to an employee.

The *Collins Case, Supra*, decided by the Court of Appeals for the 4th Circuit, is strikingly analogous in many respects to the instant case. In the *Collins Case* the employee had operated the switch in question many times on the day in question. In the instant case the employee testified that he did this very work, lifting of brake shoes, every day. In the *Collins Case*, neither the employee nor any of his co-workers who had operated the switch on previous occasions had ever complained of the condition of the switch to their superiors. In the instant case the employee readily admitted that no complaint had ever been made regarding the equipment furnished or the working conditions.

We respectfully submit that the *Collins Case* is persuasive authority for the Petitioner's position in this case. In the *Collins Case*, as in this case, the identical work being done at the time of the alleged injury had been done by the injured employee and other employees on various occasions without mishap. This is particularly true in the instant

case, where over a period of years the Respondent had done this identical work, as he put it, "every day", without mishap.

Certainly where a given piece of work is done in the same way and manner over a long period of time without mishap to any employee, there is no cause or reason for the employer to anticipate that any mishap will occur to the employee while doing such work in such manner. That is the principle demonstrated by this Court's holding in the *Inman Case*. We submit that that principle is even more applicable in the instant case than it was in the *Inman Case* and the fact that this employee, Respondent, had done this very work, day in and day out, without mishap, is conclusive evidence that there was no cause or reason for the Petitioner, employer, to anticipate that any injury would result from the doing of such work in such manner. As was pointed out by the Court in the *Collins Case*, *Supra*, the evidence must go further than merely give rise to speculation whether the injury was due to the manner in which the work was being done, or to the defective back of the man.[1] There is no evidence in this case that this employee was subjected to any unusual or undue strain. He was subjected to some strain, as any lifting would involve some strain. The fact that there was some strain involved can not give rise to an anticipation of injury. It is apparent that on other occasions when the Respondent had performed the work he was doing on the occasion in question, he had been subjected to some strain, and no doubt when other employees were doing this work they were also subjected to some strain. The point we

[1] Respondent had a history of difficulty with his back since 1953 (S.F. P. 263)

wish to make is simply that the experience of Respondent and the other employees, doing the same type of work that the Respondent was doing on the occasion in question, is ample, convincing and we submit, conclusive evidence that the doing of this work did not involve any unreasonable strain or risk of injury to the employee. There is absolutely no evidence that any employee ever sustained any injury while doing the type of work that the Respondent was doing on the occasion in question, until the Respondent's injury itself. Surely not every strain an employee is subjected to in doing heavy manual labor, as was Respondent, (S.F. P. 407), is evidence of negligence. The employee in the *Collins Case, Supra,* was subjected to some strain, and the employee in the *Crookham Case,* was subjected to some strain. On this point it should be noted that the employee in the *Crookham Case* was subjected to more strain than the employee in the instant case, in that he was lifting a heavier weight than was the employee in the instant case.

While it is true that the only precise question presented in this case is the sufficiency of the evidence to sustain a jury's verdict, Petitioner respectfully submits that the import of the case is much broader. It involves a Federal Statute which governs a tremendous amount of litigation. The Texas Court has wholly failed to apply the principles enunciated by this Court in the *Inman Case,* and tacitly approved by this Court in the *Collins Case.* The Texas Court has misread, or misinterpreted the meaning of this Court's decision in the Case of *Rogers v. Missouri Pacific Railroad Co.,* 352 U.S. 500, 77 S. Ct. 443 (1957). A reading of the Court's opinion will clearly demonstrate

that the Court did not even attempt to consider this case in the light of the *Inman* and *Collins Cases*, even though both of these cases were presented to the court and argued. Inasmuch as this decision will bear on an entire class of litigation, we respectfully submit that the case is one of sufficient importance to warrant the attention and consideration of this Honorable Court.

Conclusion

The Federal Act does not make Petitioner an insurer, but rather applies the standard of reasonable care. The ordinary man is not perfect and is not clairvoyant. He can only test the future by his past experience. Where, in the past, work has been done day in and day out in a specific manner, without mishap, there is no cause for the ordinary man to forsee that the next time the work is done in such manner an injury will result. Such foresight would be far beyond that possessed by ordinary mortals.

Without some danger or risk being reasonably foreseeable, there is no cause for the reasonable man to take precautions. It necessarily follows that there was no reason for Petitioner to take any precaution to prevent the possibility of an employee having to lift fifty pounds, simply because there was no reason or cause to expect injury from such activity.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court issue a Writ of Certiorari directed to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, at Waco, Texas, in order that this Court may review the record and opinion of such

Court and finally reverse the judgment entered by said Court of Civil Appeals and the District Court, and render judgment in favor of Petitioner, and Petitioner prays for such other and further relief, both general and special, at law and in equity, to which it may show itself justly entitled.

Respectfully submitted,

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Jan. 13, 1961

Certificate of Service

I certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed on the_____day of January, 1961, to the Respondent's attorneys, Messrs. Hill, Brown, Kronzer & Abraham, Mafrige Bldg., Houston, Texas.

Howard S. Hoover

APPENDIX "A"

AFFIRMED JULY 7, 1960

No. 3739

In The

COURT OF CIVIL APPEALS

For the Tenth Supreme Judicial District of Texas
At Waco

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant

v.

FRANK G. MENDOZA, Appellee

Appeal from District Court of Harris County

OPINION

This is a negligence case. Plaintiff grounded the action under the provisions of Section 51, et seq., of 45 U.S.C.A., (Federal Employers Liability Act) and the amendments thereto. Defendant entered a general denial and by trial amendment specially plead that plaintiff was negligent and that such negligence was a proximate cause of his injuries, in that plaintiff failed to get in a proper position before attempting to raise the brake-shoe and lift it off of the rail, and that such negligence was the sole proximate cause of his

injuries. In the alternative, defendant alleged that plaintiff's negligence constituted 90% of the total negligence involved, and further plead that the occurrence was the result of an unavoidable accident. Defendant's Motion for directed verdict was overruled. The jury found substantially: (1 and 2) That Terry, the fellow workman and the man in the pit, failed to use the iron bar to prevent the brake shoe from falling onto the rail as would have been done by a reasonably prudent person exercising ordinary care, and that such failure was the proximate cause for the occurrence of July 13, 1957; (3 and 4) That Terry ordered the brake shoe released when the iron bar was not in place, but that such act on the part of Terry was not negligence; (6 and 7) That the Railroad Company failed to furnish such equipment to prevent the brake shoe from falling onto the rail as would be furnished by a reasonably prudent employer, and that such failure was the proximate cause of the occurrence; (8 and 9) That the Railroad Company failed to furnish to Mendoza such a safe place in which to work as would have been furnished by a reasonably prudent employer exercising ordinary care, and that such failure was the proximate cause of the occurrence; (10) That Mendoza did not fail to get into such a position before attempting to lift the brake shoe in question off the rail as would have been done by a reasonably prudent person exercising ordinary care; (14) That the occurrence was not the result of an unavoidable accident; (15) The jury awarded plaintiff the sum of $35,000.00 to compensate him for his injuries. The Court overruled Defendant's Motion for Judgment Non Obstante Veredicto, and granted Plaintiff's Motion and entered judgment for plaintiff in the sum of $34,698.87, and

awarded to the United States Retirement Board the sum of $301.13, with interest, and taxed costs against defendant.

The judgment is assailed on eight points; they are substantially to the effect that the Court erred:

(1 and 3) In overruling Defendant's Motion for Instructed Verdict, and its Motion for Judgment Non Obstante Veredicto, and in entering judgment for appellee, because there is no competent evidence in the record which supports a finding of negligence against the defendant, and because there is no competent evidence tendered to support a finding that any negligent act or omission on the part of defendant was a proximate cause of appellee's injuries.

(2 and 4) In submitting issues 1, 6 and 8, and 2, 7 and 9, because there is no competent evidence to support an affirmative answer to any of said issues.

(5 and 6) In refusing to set aside the answers of the jury to Issues 1, 6 and 8, and to issues 2, 7 and 9, because the answers of the jury to each issue are so against the great weight and preponderance of the evidence as to be manifestly wrong.

7) In overruling Defendant's objection "C" to Special Issue No. 15.

(8) Because the amount of damages awarded by the jury in answer to Issue No. 15 in the sum of $35,000.00 is grossly excessive at least in the sum of $20,000.00, and the verdict should be set aside for the reason that an award so grossly excessive clearly evidences the deep seated prejudice on the part of the jury against appellant and is clearly against the overwhelming preponderance of the

evidence as to the extent of plaintiff's injuries. In the alternative, the Court should require that a remittitur in the sum of $20,000.00 be filed and in the event a remittitur is not filed, the judgment should be set aside, and a new trial ordered.

Defendant, in its brief, says substantially that the first four points present the contention that there is no evidence to support the findings of negligence and proximate cause made by the jury, and they brief them together. In appellants brief we find substantially the following statement:

The facts relative to the liability issue are not in substantial dispute. Briefly, the Plaintiff received whatever injury he had while he was working in Settegast Yards on July 13, 1957. He and two other employees were engaged in renewing five brake shoes on a locomotive which was then in the shops. They had renewed four of the brake shoes and were in process of renewing the fifth, when the incident in question occurred. The old shoe had been taken off and the three were in the process of placing a new shoe on. One of the employees, Davis, was standing approximately four feet from the locomotive wheel, where the plaintiff was located, holding the brake rigging back so as to give the Plaintiff some slack between the rigging and the wheel so that the brake shoe could be fitted. The other employee, Terry, was in the pit, underneath the locomotive. The plaintiff placed the brake shoe on top of the locomotive wheel and slid it around the wheel, but the shoe, instead of stopping at the place where it should have stopped, slid down to the rail. No injury occurred, nor was anyone hurt by the shoe sliding down to the rail. However, since it was on the rail it was necessary that it be raised back up to the proper position which, according

to the plaintiff, was about 12 or 18 inches from the rail. The plaintiff therefore reached down, on his knees, and, with the help of Terry, lifted the shoe back up to its proper location. It was after this job had been completed and the plaintiff had stood up that he stated that he felt a burning sensation in his stomach and groin. There was no other incident and the plaintiff did not, according to his admission, slip or fall while lifting the brake shoe.

Appellants then quote from Mendoza's testimony:

"On the night in question I had been working with Mr. Terry and Mr. Davis most of the night. We had put the entire eight hours in working together. When we first started on this brake job we picked the brake shoes up at the end of the shop. The laborers bring them to that point. There were five brake shoes to put on this engine on this night and we were putting the last one on when the incident occurred. When putting the other brake shoes on we just kinda divided up. Sometimes I lifted it and sometimes one of the other men lifted it and which ever one came first, well he lifted it up and put in on the wheel. That's the way it goes, we are all working together. I had put some of the other brake shoes up on the wheel that night. Mr. Terry had put some of the others up and Mr. Davis had put some of the others up. On this particular occasion, the one in question, I think that I put the brake shoe up on the wheel. Mr. Davis was pushing the slack out of the brake rigging so that we would have enough room to work and Mr. Terry was in the pit. I put the shoe up by myself and was holding it as it came over the side. Before I turned the shoe loose I asked Mr. Terry if he was ready and he said, 'Yes, I am ready', and I replied, 'Well here I go with the shoe', and I just let it go down. You just have to get your hands off of it, because you

can't hold it anymore, let it go. I do not know whether there was a bar there to catch it (the brake shoe) or not. I just asked him if he was ready to hold it and he said yes turn it loose. That's what I did and it went on down to the rail. I didn't say anything to him about it going on down to the rail.

"Q. Was that the first one that had gone by to the rail that evening?
A. I think so.
Q. The way you say it makes me think you're not too sure on that point.
A. Well, I can't remember it because, like I tell you, we were rushing and we put five shoes on that evening. And so I don't remember whether another one before that fall down on the rail. But in case they do, why, we just have to lift it and put it back, that's all.
Q. It wasn't too unusual for them to go on down to the rail, was it?
A. No. That happened lots of times.
Q. And once they got down on the rail, you followed the usual procedure in getting it back up in place, did you not?
A. You just have to pick it up and push it up and put 'em in place that's all.
Q. You had lifted several before this one, had you not?
A. Oh, yes. Yes sir. We do that every day.
Q. And you did it the same way on this occasion as you have done previously, did you not?
A. Yes.
Q. Had you ever made any complaints or said anything to the foreman about having some bar or some stand or something there to catch it in case it went by?
A. No sir. Nobody did. We just did it the best way we can.
Q. Well, that's the way you have always done it?

A. Always done it, yes, sir.
Q. And neither Mr. Humbert nor any of the foremen were there telling you how to do it, were they?
A. He just tell you to do this, and that's all; you better know how to do it.
Q. Well, you are a man of long experience—
A. Yes sir.
Q. —in that type of work, so he could be assured that you were familiar with the correct way to do this work?
A. That's right.
Q. That was your job, after you had been there for so long as you have been there, to know how to do those things, isn't it?
A. Yes, sir.
Q. Mr. Humbert or no other foreman was standing over you while you were doing the work saying, 'rush, rush,' was he?
A. No sir. They got their job too. They got to keep on going.
Q. And they do not give you a specific time limit to do any particular job, do they?
A. Not exactly, no sir. Whenever they're in a rush, why, they tell you they want the thing as quick as you can, and that's all. The man do the best he can.
Q. And, of course, they leave it up to you, knowing that you are experienced to do the work as best you can?
A. That's right.
Q. Without taking any more time than is necessary to properly do the job?
A. Yes sir.
Q. You feel, of course, and the men working with you, that Mr. Humbert did not want you to rush so as to not properly do the job?
A. No sir. They don't want me to rush it, but he knows we do the job and that's all.

"It is not at all unusual for a brake shoe to slide on down to the rail. It happens sometimes.

Q. On these other occasions when the shoe had slipped on down to the rail, had you gotten down and lifted it up just as you did on the occasion in question?
A. Yes sir.
Q. The very same way?
A. Same way.
Q. You did not slip or fall, or anything of that sort, while you were lifting it, did you?
A. No sir.

"The rail (where the brake shoe came to rest) was approximately 30 or 36 inches above the concrete floor. It was necessary to pick the brake shoe up from that position and push it up about ten or twelve inches. Mr. Terry was attempting to help me do this, but he can't do too much since he is on the inside. This particular shoe was not any heavier than others which I had helped put on. All the engines of this type have this type brake shoe. The weight of this shoe was about the same as others that I had handled. I did not notice any unusual pain as I was lifting or pushing the brake shoe up until I got through putting it in place. When I attempted to stand up after putting the shoe in place I first felt the pain in my back and to burning in there (groin). I was senior man of the three of us who were working there on that particular job.

Q. Well, I understand that you are testifying to that, but my question is you have used the key yourself, though, have you not?
A. Oh, yes. Yes.
Q. And you are not going to say that Mr. Terry was wrong in deciding to use the key instead of the bar on this particular occasion, are you?
A. No sir.

Q. Well, Mr. Mendoza, could it have been because the shoe came down with considerable momentum than he expected it to come down with?

A. Well, I don't think it was coming no faster than the others because it's just a certain space in there. You guide that shoe over the wheel at the certain place and then you just have to turn it loose; so they all come the same.

Q. You were the man that had hold of the shoe?

A. At that time, yes sir.

Q. And you had control over the momentum with which it came down?

A. I can't understand you.

Q. You had control over how fast the shoe came down?

A. Well, I just control the shoe until I can reach it, and I had to turn it loose; that's all.

Q. I understand that, but neither Mr. Terry nor Mr. Davis had any control whatsoever over the shoe?

A. No. I was the only one who handled that shoe then because Terry was in the pit and Davis was on the other end of the truck."

Appellants cite and quote extensively and discuss the following decisions from the Supreme Court of the United States: *Tiller v. Atlantic Coast Line R.C.* (1943), 318 U.S. 54, 63 S. Ct. 444; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 64 S. Ct., 409 (1944); *Brady v. Southern Ry. Co.* (1943), 320 U.S. 476, 64 S. Ct., 232; *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 77 S. Ct., 443; *Webb v. Illinois Central R. R. Co.*, 352 U.S. 512, 77 S. Ct., 451; *Herdman v. Penn. R. R. Co.*, 352, U.S. 518, 77 S. Ct., 455; *Chesapeake & Ohio Ry. Co. v. Stapleton*, 279 U.S. 587, 589, 49 S. Ct. 442, 443, 73 L.Ed. 861, *Atlantic Coast Line R. R. Co. v. Collins*, (Ct. of App. 1956, 4th Circuit) 235 F. 2d 805; *Inman v. Baltimore & Ohio Railroad Co.*, 80 S. Ct. 242.

The appellant, after a discussion and quotations from the foregoing decisions of the United States Supreme Court, and some from United States Court of Appeals, in which petitions for writs of certiorari have been denied, says in effect that a declaration of our Texas Supreme Court in the case of *Port Terminal Railroad Association v. Ross*, (a Federal Employers' Liability Act case), 289 S.W. 2d 220, is controlling here, because in that case the Court clearly and positively laid down the principles which are to guide and control our Texas Courts of Civil Appeals and our trial courts in cases of this nature. We are in accord with this view. As we understand the appellant its position here is that there is an absence of evidence either circumstantial or direct tending to show that the negligence of the defendant as found by the jury had any influence or effect in causing the plaintiff's injury, and that by reason thereof the Court should have granted judgment for it on its motion not withstanding the verdict. Stated another way, it is appellant's position that the failure of Terry to use the bar, plus the fact that the shoe falling did not inflict any injury on plaintiff, that there is no causal connection between the failure of Terry to use the bar and the act of plaintiff in getting in a position to lift the brake shoe. As we understand the opinions of the United States Supreme Court, we do not think that we are authorized to make such deductions.

In *Rogers v. Missouri Pacific R. R. Co.*, supra, (cited by appellant) we find this statement:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the

> slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence."

This doctrine was re-announced in *Inman v. Baltimore & Ohio Railroad Company*, supra. It is without dispute that in this operation it was the duty of one member of this three-man crew to be in the pit under the locomotive and in this instance it was the worker, Terry. His job is and was to position the steel bar so as to stop the steel brake shoe after it had moved around the circumference of the wheel to its operating position. At the time of the occurrence, Mendoza was attempting to place the brake shoe in position, and in order to do so, he had to lift the brake shoe and place it on the top of the step ladder in order to start the shoe on its downward course around the wheel. The third man on the crew, who was Davis, was standing some four to eight feet from Mendoza, and it was his duty to exert pressure against the brake rigging of the engine, so as to permit the shoe to seat when it came down into position. As above stated, the bar was to be used by

the man in the pit to prevent the shoe from falling past its designated position. On this occasion Terry used only a small brake shoe key for that purpose, although a bar was available and was laying on the floor of the pit with Terry. Terry used the brake shoe key in spite of the fact that the bar was safer and despite the fact that the falling shoe can knock the key aside and permit the shoe to fall onto the rail. Davis testified to the effect that when a bar is not used in the operation there is a good chance that the brake shoe will fall, and that the only way to prevent it from falling is to use the bar. As we understand the testimony of Terry, Davis and Mendoza, once the shoe was on the rails, the man required to pick it up was in an awkward, strained position. In the face of this evidence the railroad contends that there is no evidence to support the jury's finding of negligence in failing to use the bar. After the brake shoe fell it rested on the rail and was wedged between the wheel and the brake shoe head. The railroad did not furnish any mechanical process or machinery to its employees to lift the brake shoe from the rail and it had to be done by manpower alone, and because of its position with respect to other parts of the engine only one man could locate himself or position himself to do the lifting. In order to do so, the man doing the lifting must squat or kneel into an awkward position to lift the brake shoe, and in this position Mendoza could not lift with the use of his legs, but must lift with his back only. In this squatting or kneeling position Mendoza was in a strain. Evidence was also tendered to the effect that Mendoza had only a small edge of the brake shoe to catch in order to lift it, and in addition to the foregoing the shoe weighed from 50 to 70 pounds, and Mendoza had

the additional difficulty on this occasion of the shoe being jammed or wedged between the wheel or brake shoe head. Testimony was also tendered from a defendant's employee, who was offered as an adverse witness, that blocks or plates would have prevented the brake shoe from falling past its designated spot and the consequence requirement of an employee to, get into an awkward or strained position to recover it, and there is an absence of evidence that defendant did furnish such blocks or plates to its employees. Evidence was also tendered to the effect that because Mendoza was the employee by the wheel in this particular instance, that it was his job to get into position to lift the brake shoe from the place it had fallen; that in so doing after he straightened up he felt a sharp pain in his back, and a burning in his groin. These are the first symptoms of the injuries made the basic of this suit. Because of the liberal interpretation in the application of the Federal Employers' Liability Act by the Supreme Court of the United States, we think we must overrule appellant's points 1 to 4 inclusive. See *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740; *Bailey v. Central Vermont Ry. Co., Inc.*, 319 U.S. 350, 63 S. Ct., 1062; *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct., 413, 417; *Tiller v. Atlantic Coast Line*, 318 U.S. 54, 63 S. Ct. 444; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29. 64 S. Ct., 409.

Appellant's Fifth Point is to the effect that the answers of the jury to Issues 1, 6 and 8 are so against the great weight and preponderance of the evidence as to be manifestly wrong. The Sixth Point makes the same complaint of the answers of the jury to Issues 2, 7 and 9. We think it our duty to overrule each of the foregoing points under

the doctrine announced by the Texas Supreme Court in *Port Terminal Rd. Assn., v. Ross*, supra, and because of the opinion of the United States Supreme Court in *Deen v. Hickman*, 79 S. Ct., Reporter, Page 1. (For history and facts of the *Deen* case see 275 S.W. 2d 529, n.r.e., 353 U.S. 929, 77 S. Ct., 715, 306 S.W. 2d 171, w. granted; 312 S.W. 2d 933, Texas Supreme Court, 317 S.W. 2d 913, Texas Supreme Court). We have given much consideration to the foregoing cases and we think that the factual situation here is quite similar in many respects to the factual situation that existed in the *Ross* and *Deen* cases.

The evidence here shows that the brake shoe weighed between 50 and 70 pounds, and that it was impossible, because of its position, for more than one man to lift it, because the brake shoe had no handhold but only a small edge for the workman to grip, and in order to grip it the workman was required to get in an awkward position, which put him in a strained position, particularly as to his back. In the light of this evidence we cannot say that as a matter of law that a reasonably prudent person would not have foreseen the possibility of injury resulting from a workman attempting to lift such an object under those circumstances. At the same time the evidence shows that it was possible to keep the shoe from falling by a simple use of an iron bar, and that the use of this iron bar was the safest way to do the work, and such bar was actually present and available and no excuse was offered in evidence as to why it was not used. The evidence also shows that the risks incident to workmen having to lift the shoe from this awkward, strained position could have been eliminated if the bar had been used.

It is true that the carrier is not the insurer of its employees, and is not liable for risks which cannot be eliminated through the exercise of ordinary care; however, it is not afforded the common law defense of the fellow servant doctrine under the F.E.L.A., 45 U.S.C.A., Sec. 51. Moreover, if a method of work followed by the carrier's employees entails foreseeable risks to other employees which would be eliminated if another readily available and previously used method were adopted, the question of whether the employees were negligent in failing to adopt the latter method is one of fact for the jury. It is our view that the jury was justified in concluding that it could reasonably be anticipated that a workman might be injured if required to assume an awkward, strained position where a heavy object had to be lifted under circumstances where the object is difficult to grasp, and the lifting done by the use of the back alone without benefit of the legs. Here the plaintiff was injured without negligence on his part, and the evidence shows only one man could grip the object and no mechanical devices were furnished to assist the employee; that the plaintiff was injured while performing the very operation which the jury apparently decided was unreasonably hazardous, and which the exercise of ordinary care would have eliminated. We think this meets the foreseeability requirements of proximate cause. Under the evidence here, once the shoe was on the rail and wedged between the wheel and the brake shoe head, only one man could position himself to lift it. It appears that because of the manner that the crew was working at the time and in the absence of mechanical devices it became plaintiff's job to place himself in a kneeling position, and this put a strain on his back in lifting the shoe. It is our view

that the answers of the jury to the foregoing issues are not against the great weight and preponderance of the evidence and Points 5 and 6 are each overruled.

Appellant's 7th Point is to the effect that the Court erred in its failure to sustain objections "C" to Issue No. 15 of the Court's Charge,

> "for the reason that there is no evidence in the record tending to show the rate of interest at which money can be safely invested in the vicinity of Harris County, Texas; that since this action is brought under the F.E.L.A., the Plaintiff is entitled to recover compensation for mental anxiety and physical pain and suffering which he may suffer in the future, and any diminished capacity to work and earn money in the future beyond the date of this trial; that such compensation is based upon the reasonable cash value of such items at the present time and the Defendant in such action is entitled to have taken into consideration the earning power of money in the vicinity in which the case is tried, which said issue fails to do. There is no evidence in the record tending to show the value of money in determining the element of damages included in Special Issue No. 15."

Appellant's complaint is decided adversely to it by virtue of an opinion of the Supreme Court of Texas in *Missouri Pacific R. R. Co. v. Kimbrell*, 334 S.W. 2d 283. The opinion of the Texas Supreme Court is clear and comprehensive and is controlling.

Appellant's 8th Point is to the effect that the amount of damages awarded by the jury is grossly excessive at least in the sum of $20,000.00, and the verdict should be set aside for the reason that an award so grossly excessive

clearly evidences the deep seated prejudice on the part of the jury against Appellant and is clearly against the overwhelming preponderance of the evidence as to the extent of Appellee's injuries. In the alternative, appellant asks that the Court require a remittitur in the sum of $20,000.00 be filed, and in the event a remittitur is not filed, that the judgment should be set aside and a new trial ordered. Much testimony was tendered on the claimed injuries of the plaintiff, and we have considered it very carefully. No doubt the physicians who testified in this cause are outstanding in their respective fields. But under the Rule in Texas, the trier of the facts has the duty to pass upon the facts, and the jury may accept any witness's testimony in part, or it may reject it in part or may reject it in toto. The Rule is that "Opinion testimony does not establish any material fact as a matter of law." See *Hood v. Texas Indemnity Ins. Co.*, 209 S.W. 2d 345, Supreme Court, Points 1 to 3. We think the evidence shows that plaintiff is totally and permanently disabled, and he has not worked since July 1957. Testimony was tendered to the effect that in the 22 months immediately preceding plaintiff's injury there was only one month when his earnings did not exceed $340.08 per month. In that month his earnings were less, because he had suffered an amputation of a finger. For twelve of those months he earned $375.00 per month, and his monthly earnings ran as high as $422.73 per month. Evidence was to the effect that had plaintiff continued working he would have received at least one raise since his injuries and although he was making higher monthly earnings in 1957 before his injury than in 1956, yet if we adopt his 1956 earnings as a base he had lost over $8500.00 in wages at the time of trial. Plaintiff was

57 years of age, and at that age he had an expectancy of 16.43 years. Assuming that his earning capacity should be limited to age 65, these eight years alone of which he was and will be deprived of earnings, eliminating raises and inflation, and taking the lower 1956 earnings as a base, would total $34,075.68, bearing in mind this is without consideration of pain, suffering and mental anguish. Dr. Lane, one of the appellant's witnesses, admitted that plaintiff had undergone servere pain; that he was not malingering and that plaintiff would have some permanent disability from the surgery alone, and that he might never be able to do hard work again. Dr. Moore, one of the appellant's witnesses, admitted signing plaintiff's exhibits 3 and 11, and these exhibits say in effect that plaintiff is totally disabled from performing each and every kind of duty pertaining to his occupation, and they also say that the onset was July, 1957, and that plaintiff will be totally disabled from an "unknown" future date. Dr. David's testimony tendered on behalf of appellee was to the effect that plaintiff was totally and permanently disabled, and that he suffered and would continue to suffer physical pain, all as a result of the occurrence of July 13, 1957. Under the record here made, we cannot say that the verdict should be set aside for the reason that the award is so grossly excessive that it clearly evidences the deep seated prejudice on the part of the jury against appellant, nor do we think this Court should require that a remittitur in the sum of $20,000.00 or any other sum be filed by the appellee. Accordingly, Point 8 is overruled. We have carefully considered each of Appellant's Points 1 to 8 inclusive, and we are of the view that none presents error, and each is overruled.

Accordingly, the Judgment of the Trial Court is AFFIRMED.

JAKE TIREY
Associate Justice.

I, R. I. Gage, clerk of the court of Civil Appeals for The Tenth Supreme Judicial District of Texas at Waco, hereby certify that the foregoing 16 pages contain a true and correct copy of the opinion filed in said court on the 7th day of July, 1960, in the following numbered and entitled cause, to wit:

Missouri Pacific Railroad Company, *Appellant*

No. 3739

v.

Frank G. Mendoza, *Appellee*

on appeal to said court from Harris County, Texas.

Witness my hand and seal of said Court, this the 16th day of December, A.D., 1960.
signed R. I. Gage, Clerk

SEAL

COURT OF CIVIL APPEALS
10th Supreme Judicial District
Waco, Texas

I, R. I. Gage, Clerk of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco, hereby certify that the following is a true and correct

copy of the Judgment entered in said court on the 7th day of July, 1960, in the following numbered and entitled cause, to wit:

Missouri Pacific Railroad Company, *Appellant*

No. 3739

v.

Frank G. Mendoza, *Appellee*

on appeal to said court from Harris County, Texas.

witness my hand and seal of said Court, this the 16th day of December, A.D., 1960.
/s/ R. I. GAGE, *Clerk*.

July 7, 1960.

Came on to be heard on the transcript of the record Cause No. 3739, entitled Missouri Pacific Railroad Company, appellant, v. Frank G. Mendoza, appellee, from Harris County; and the same being considered, it is the opinion of the Court that there was no error in the judgment, it is adjudged and ordered that the judgment of the trial court is affirmed; it is further ordered that the appellant, Missouri Pacific Railroad Company, principal, and American General Insurance Company, surety, pay all costs in this behalf expended, and this decision be certified below for observance. Opinion by Justice Tirey.

APPENDIX "B"

SECTION 51 - LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE: DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce;

or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by

such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

APPENDIX "C"

SECTION 1257. STATE COURTS: APPEAL: CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

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FILED
FEB 3 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 650

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

FRANK G. MENDOZA,
Respondent.

REPLY TO PETITION FOR CERTIORARI

WALTER JAMES KRONZER, JR.
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BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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MISSOURI PACIFIC RAILROAD COMPANY,

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v.

FRANK G. MENDOZA,

Respondent.

REPLY TO PETITION FOR CERTIORARI

To the Honorable Supreme Court of the United States:

Respondent, Frank G. Mendoza, respectfully prays the Court to deny the Petition for Write of Certiorari to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco for the reasons hereafter stated:

JURISDICTION

Respondent denies that the Court has jurisdiction under 28 U.S.C. Sec. 1257, subsection (3) as the Petition is an admitted request to weigh the "sufficiency of the evidence to sustain a jury's verdict" (See Page 16 of the Petition), a pure *fact* inquiry foreclosed to State and Federal Courts

by *Deen* v. *Hickman*, 358 U.S. 57, 79 S. Ct. 1 (1958). It is only when "the proofs" (don't justify) with reason that the jury's conclusion that employer negligence played a part in producing "the injury" (a question of law) that this Court, or any other appellate Court, can interfere. The trial Court submitted the appropriate tests for determining negligence in the charge and the intermediate Texas Court of Civil Appeals reviewed the evidence under the standard announced in *Deen* and *Rogers* v. *Missouri Pac. R. R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 449 (1957).

Further, aside from Petitioner's frank concession that "it is true that the only precise question presented in this case *is the sufficiency of the evidence to sustain a jury's verdict*" (Page 16 of the Petition), an examination of Petitioner's "Statement of the Case" (Pages 3-6) fairly discloses that its attack is no more than a request to "weigh evidence." It either slants, minimizes or disregards unfavorable testimony. This does not present a matter within the purview of this Court's jurisdiction.

REPLY TO "QUESTIONS PRESENTED"

In suggesting that the cause should be reviewed to determine if there is "any evidence of *probative value* tending to show that the Petitioner was guilty of negligence", Petitioner, perforce its "Argument," seeks to add to the test of *Rogers* by interpolating state Court "words of art" for testing the sufficiency of the evidence.

The rhetorical nature of the second "question" should not, of course, be considered as suggesting that the trial Court did not use the "reasonable and prudent man" test in submitting the case to the jury.

STATEMENT OF THE CASE

Petitioner's "Statement" will not suffice because it has approached the case as if it had obtained the jury verdict.

On the evening of his injury Respondent was working as a machinist for Petitioner, as he had done for some thirty-two (32) years previously, as a member of a three-man crew composed of Davis and Terry and himself. The crew was notified about nine that evening that they were not to take a coffee break but were instructed *to rush the changing of brake shoes on a diesel locomotive* (S.F. 20). Within the hour they had changed three or more brake shoes (S.F. 20, 49) and were about ready to change the last one. Mendoza had carried the large steel brake shoe (S.F. 50), estimated to weigh between fifty (50) and seventy (70) pounds (S.F. 95, 99, 297, 318), and had placed it on top of the wheel. To accomplish this the shoe must be carried up a step ladder in order to place it on top of the high diesel engine wheel (S.F. 94). The object of the crew was to manuever the steel shoe from the top of the wheel to a position about one-half way around it (S.F. 96, 293, 319, 323). In order to accomplish the movement of the shoe from the top to its operating position the crew worked as a team. Terry was in the pit under the locomotive and his job was to position a steel bar so as to stop the steel brake shoe after it moved into the operating position (S.F. 95, 297, 300). Respondent was required to remain on top of the step ladder in order to start the shoe on its downward course around the wheel (S.F. 96). Mr. Davis stood from four to eight feet from Respondent so that he could exert pressure against the brake rigging of the engine so as to permit the heavy shoe to seat when it came into position (S.F. 22, 95, 136, 294, 317).

While the crew was occupying such position the Respondent hollered to Terry in the pit, "Are you ready?" and Terry

replied "Yes, I'm ready". *In railroad parlance this means that the steel bar should have been in position to prevent the brake shoe from falling past its proper place* (S.F. 22, 63, 97). However, *Terry did not have the bar in place* (S.F. 321). Then Mendoza said, "Well, here I go with the shoe," and began his work of moving the shoe around the wheel. *Respondent was not in a position to see whether Terry had the bar in place or not* (S.F. 23) and by reason of the weight of the shoe and Respondent's position on the ladder he could not control the shoe after starting it on its descent

Since Terry did not use the bar (S.F. 321) the brake shoe did not stop where it was supposed to but fell down onto the rail and was wedged between the brake head and the wheel. A bar should have been used by the man in the pit to prevent the shoe from falling past its proper position (S.F. 293-294, 295, 300).

In this operation the man in the pit (Terry) is responsible for placing the bar to prevent the shoe from falling. Although a bar was available on the floor of the pit Terry elected not to use it (S.F. 321, 325). Instead he chose to use a brake shoe key despite the fact that a bar is safer (S.F. 335, 400). A falling shoe can knock a key (such as Terry used) aside so as to permit the shoe to fall onto the rail (S.F. 64). The shoe cannot fall when a bar is used (S.F. 165, 300). Terry did not use the available bar even though his purpose in being in the pit was to use it (S.F. 63, 297).

Petitioner's employee Davis, also a member of the crew of three, testified that if a bar is not used there is a good chance the brake shoe will fall and that the only way to prevent it from falling is for the man in the pit to use the bar (S.F. 300. See also S.F. 400).

After the shoe had fallen because of Terry's failure to use the bar it rested on the rail and was *wedged* between

the wheel and the brake shoe head (S.F. 93, 300). In this position there was no mechanical aids furnished by Petitioner to lift it (S.F. 298, 304, 403). Therefore, the heavy brake shoe had to be lifted by manpower alone (S.F. 325, 401). Each witness who testified regarding this procedure said that once the shoe was on the rail that the man required to pick it up was in an awkward, strained position that was "pretty rough on the manpower" (S.F. 296-297, 298, 299, 305, 327, 403-404). Only one man could locate himself to do the lifting because of the position of the shoe with respect to other parts of the engine (S.F. 25, 298). That man (in this case Respondent Mendoza) must squat or kneel into an awkward position to lift the shoe (S.F. 298, 327, 340, 403). In this position Respondent could not lift with the aid of his legs but had to lift with his back only (S.F. 298, 404). This squatting or kneeling position placed the employee in a strain (S.F. 299) and Respondent had only a small edge of the shoe to grasp in order to lift it (S.F. 100). On this occasion, in addition to the awkward, strained position required of Respondent to lift the heavy shoe, he faced the additional difficulty of the shoe being jammed or wedged between the wheel and the brake shoe head (S.F. 300, 325-326, 338). Petitioner did not furnish its railroad employees blocks or plates which would have prevented the shoe from falling past its designated spot and thus avoided Respondent being required to get into the awkward and strained position to recover it (S.F. 300, 329, 330).

Since Respondent was by the wheel he faced the difficult job of lifting the brake shoe (S.F. 97 98). As he straightened from doing so he felt a sharp pain in his back and a burning in his groin — the first symptoms of the injury made the basis of this suit (S.F. 29, 54).

Petitioner seeks to leave the impression that the falling of the brake shoe was a very frequent occurrence. Respond-

ent is unacquainted with any principle which would relieve Petitioner of its negligence found by the jury against it with respect to this occurrence and injury by reason of the frequency of similar occurrences. However, the contention loses factual support upon a consideration of this record as a whole. Respondent is a man of considerable language difficulty and very limited education (S.F. 69-70). Although he did testify that the shoes had fallen many times it should be borne in mind that these "many times" covered thirty-two (32) years of railroad service. Petitioner did not furnish any steel bars which would have prevented the occurrence giving rise to Respondent's injury. Petitioner's employees obtained the bars with their own resources (S.F. 165). The shoes may have fallen on many occasions (since Petitioner had not furnished its employees with bars) and continued to do so until the railroad employees obtained bars by their own means. *It is sufficient to say here that it is undisputed on this record that no shoe fell when a bar was being used* (S.F. 165).

Brief reference is made to Petitioners' argument (pages 11 and 12) that the undisputed testimony is that the position Mendoza was forced to assume would not "cause any unusual strain" on his back. The basis of this argument is found in the deposition testimony of Petitioner's doctor (S.F. 274). Aside from the fact that medical opinion testimony is never conclusive, or the circumstance that each lay witness disagreed, or that Petitioner is not complaining about the damage finding (see page 3 of the petition), Respondent's medical witness opined that the "cause of his disability (was) the straining and lifting he did on July the 13th, 1957." (S.F. 377)

ARGUMENT

The evidence in the case is ample to sustain the jury's findings that the railroad employee (other than Respondent) was negligent in using the key instead of the bar, in failing to furnish Respondent with proper equipment, and in failing to furnish Respondent with a safe place in which to work.

This case is a far cry from *Inman* v. *Baltimore & Ohio Railway Company*, 80 Sup. Ct. 242 (1959) in which an intoxicated third party motorist struck the railroad employee. Nor does Petitioner's tortuous effort to compare the causes deal fairly with the bases of liability. The matter of whether Respondent and others had been required to lift fallen brake shoes in the past does not reach the failure of Terry to have used the "bar", or the failure of Petitioner itself to provide adequate means to have prevented the occurrence. *Davis* v. *Virginian Ry. Co.*, 80 S. Ct. 387 (1960) is controlling of this question. On the "lifting" or "straining" features, see *Deen* v. *Gulf, C. & S. F. Ry. Co.*, 353 U.S. 929, 77 S. Ct. 715 (1958); *Deen* v. *Hickman*, supra; *Zegan* v. *Central R. of N. J.*, 266 F. (2d) 101 (C. C. A. 3rd, 1959); *Atchison, T. & S. F. Ry. Co.* v. *Studer*, 213 F. (2d) 250 (C.C.A., 9th 1954); *Korte* v. *New York, N. H. & R. Co.*, 191 F. (2d) 86 (C.C.A., 2d, 1951), cert. den., 342 U.S. 868, 72 S. Ct. 108; *Port Terminal Rd. Ass'n* v. *Ross*, 155 Tex. 447, 289 S.W. (2d) 220 (1956).

The "high standard required" of employers under the F.E.L.A. and the Jones Act and the plain rejection of "the refined distinctions necessary in common-law tort doctrine for the purpose of allocating risks," *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 78 S. Ct. 394, 401 (1958) has not resulted in the elimination of "all meaningful judicial supervision over jury verdicts." *Harris* v. *Pennsylvania Rd. Co.*, 80 S. Ct. 22 (1959) Associate Justice Douglas concurring

opinion, when taken in conjunction with his appendix to *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 420, 422-423 (1949), reflects that from 1943 to October 19, 1959, 164 F.E.L.A. applications were presented to the Court. In that period not one was granted to review a judgment of a state or federal court *upholding a jury verdict for either the employee or the employer*. And, we respectfully add, all, or at least the great majority of the employer applications attacked evidence for less sufficient than is here involved. The *Wilkerson* test has not been tarnished by the *Inman* decision. The Court said:

> "• • • Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. • • •" (336 U.S. at page 62)

CONCLUSION

Employers under the F.E.L.A. invariably and erroneously assume that Supreme Court relief is a "one-way street" because they cannot get the Court to review jury verdicts. Neither can employees. One shudders to contemplate the hue and cry that would be generated if this Court were to render a judgment, contrary to the verdict, *for an employee*. But, for these purposes, no more need be stated than is evident from this record; the injury resulted from the negligence of a co-employee and the failure of Petitioner to have discharged the "high standard" of care thrust upon it "with a view to adjusting equitably between the worker and his employer the risks inherent in the railroad industry." *Kernan* v. *American Dredging Co.*, at page 401.

WHEREFORE, premises considered, Respondent prays that writ of certiorari be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing reply to the Petition for Writ of Certiorari has been mailed on the 31st day of January, 1961, to Petitioner's attorney, Attorney Howard S. Hoover, Esq., Bank of the Southwest Building, Houston 2, Texas.

Walter James Kronzer

Walter James Kronzer, Jr.